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CAVEAT EMPTOR

By Edward Clayton Jones
Chairman, Junior Barristers Committee

Edward Clayton Jones
—By courtesy of
"Bench & Bar"

THE writing and editing of the Los ANGELES BAR BULLETIN is not for neophytes. Yet neophytes respectfully hand to you this issue. It is entirely the product of the Junior Barristers. It is fervently hoped that a perusal of the material will not make this fact self-evident and render this bold announcement redundant. We do not think so. We are proud of our contributors.

To the Association we express our gratitude for this opportunity to display our wares. A channel for professional self-expression gives incentive, encouragement and self-confidence to young lawyers. As such it constitutes an asset to the bar and gives token of the future well-being of the law. Farsighted leadership in our Association has recognized this and bestowed upon us the present privilege.

You may find it of interest to know that the ranks of the Junior Barristers have greatly increased in the past year. So, too, has the participation of its members in bar association projects. Junior members are serving upon all of the committees of the Association and are quick to volunteer for such special duties as frequently arise. This is as it should be.

Without further ado, and with excusable pride, we offer for your consideration the September issue of the BULLETIN.

STATUS AND EFFECT OF SEPARATION AGREEMENTS UNDER CALIFORNIA LAW

By Stanley A. Barker

Stanley A. Barker
—By courtesy of
"Bench & Bar"

THE usual type of separation agreement entered into between a husband and a wife attempts to accomplish three purposes. These purposes are:

(1) to divide the property between the spouses;

(2) to provide for the support and maintenance of the wife;

(3) to provide for the custody and support of children, if any.

A husband and wife may contract with each other for the purpose of dividing or changing the status of their property.[1] Insofar as a separation agreement purports to divide property between the spouses, it is binding upon and is not subject to modification by the court unless there is a showing that the agreement is inequitable.[2] The portions of a separation agreement which purport to divide property may be (but they are not required to be) approved by the court in a subsequent divorce action and incorporated in the divorce decree.[3]

That portion of a separation agreement which purports to deal with the custody and support of children is never binding upon the court in a later divorce action, because the husband and wife cannot restrict the power of the court to act for the best interests of the children.[4]

SOURCE OF MUCH LITIGATION

Provisions in a separation agreement which provide for the support and maintenance of the wife have been the source of much litigation. This largely has been due to the fact that such

[1]Cal. Civil Code, §158; Cal. Civil Code, §159.
[2]*Puckett v. Puckett*, 21 Cal. (2d) 833, 136 Pac. (2d) 1 (1943); *Adams v. Adams*, 29 Cal. (2d) 621, 177 Pac. (2d) 265 (1947); *Holloway v. Holloway*, 79 Cal. App. (2d) 44, 179 Pac. (2d) 22 (1947).
[3]*Puckett v. Puckett*, 21 Cal. (2d) 833, 136 Pac. (2d) 1 (1943); *Holloway v. Holloway*, 79 Cal. App. (2d) 44, 179 Pac. (2d) 22 (1947).
[4]Cal. Civil Code, §§138, 139; *Puckett v. Puckett*, 21 Cal. (2d) 833, 136 Pac. (2d) 1 (1943).

provisions for support may be construed as an attempt to accomplish either one of two things: (1) to make an equitable division of the property, or (2) to give a support allowance in the nature of alimony to the wife.

The fact that a husband agrees, under the terms of a separation agreement, to make either lump sum or periodic payments to his wife does not necessarily mean that he thereby intends to pay her alimony. Thus, if the husband agrees to make payments to his wife in lieu of a transfer of community property to her, such payments constitute one method of dividing the property and are not subject to modification.[5] If the wife agrees to waive support payments or to limit the amount of payments to her in consideration for receiving a more favorable portion of the community property than she normally would have received, such a waiver or limitation is not subject to modification because it is an integral part of the division of property between the spouses.[6] If an agreement which contains provisions requiring support payments to the wife can be considered, as a whole, as an attempt to achieve a settlement of property rights, such an agreement will not and cannot be modified by the court even though it has been incorporated into a divorce decree.[7]

SUPPORT SEPARABLE FROM AGREEMENT

In contrast to the above situation, support payments made to a wife under the provisions of a separation agreement may be separable from the provisions of the agreement which purport to divide property. These separable payments are in the nature of alimony.[8] Provisions for such alimony payments are enforceable as contract obligations even though the provisions are not presented to the court in a subsequent divorce action.[9] If the alimony provisions are presented to the court and if the divorce decree orders compliance with those provisions, the payments then can be enforced by contempt proceedings, but they are subject to modification by the court.[10] Any order to pay alimony is subject to a modification upon a showing that there has been

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[5]*Ettlinger v. Ettlinger*, 3 Cal. (2d) 172, 44 Pac. (2d) 540 (1935); *Puckett v. Puckett*, 21 Cal. (2d) 833, 136 Pac. (2d) 1 (1943).

[6]*Adams v. Adams*, 29 Cal. (2d) 621, 177 Pac. (2d) 265 (1947); *Holloway v. Holloway*, 79 Cal. App. (2d) 44, 179 Pac. (2d) 22 (1947).

[7]*Puckett v. Puckett*, 21 Cal. (2d) 833, 136 Pac. (2d) 1 (1943); *Holloway v. Holloway*, 79 Cal. App. (2d) 44, 179 Pac. (2d) 22 (1947).

[8]*Hough v. Hough*, 26 Cal. (2d) 605, 160 Pac. (2d) 15 (1945).

[9]*Sanborn v. Sanborn*, 3 Cal. App. (2d) 437, 39 Pac. (2d) 830 (1934) [petition for hearing denied by Supreme Court on Feb. 28, 1935].

[10]Cal. Civil Code, §139; *Puckett v. Puckett*, 21 Cal. (2d) 833, 136 Pac. (2d) 1 (1943); *Hough v. Hough*, 26 Cal. (2d) 605, 160 Pac. (2d) 15 (1945).

a change of circumstances since the time when the order was made.[11]

The rule in California prior to June, 1945, was that if the alimony provisions of a separation agreement later were incorporated into a divorce decree, payments could be enforced either by bringing an action on the agreement or by enforcing the divorce decree. No difficulty would arise so long as the decree and the alimony provisions of the separation agreement obligated the husband to pay the same amount of money. Upon a modification of the decree, however, the husband immediately was placed in a disadvantageous position. For example, if the husband secured a downward modification of the payments under the decree, the wife simply would sue him on the agreement in order to recover a higher amount. If the wife secured an upward modification of the payments specified in the divorce decree, she obviously would sue on the decree.

UNSATISFACTORY—FOR THE HUSBAND

This unsatisfactory situation (unsatisfactory, at least, for the husband) was rectified partly in 1945 by the decision in *Hough v. Hough*.[12] In that case, the wife sued the husband for di-

[11]Cal. Civil Code, §139.
[12]26 Cal. (2d) 605, 160 Pac. (2d) 15 (1945).

JUNIOR BARRISTERS OFFICERS

Officers of the Junior Barristers for 1948-49 are Chairman Edward Clayton Jones (see picture and article on page 1 of this issue); First Vice-Chairman Robert M. Barton (left above); Second Vice-Chairman David E. Agnew (center), and Secretary-Treasurer Edward C. Freutel, Jr. (right). —Barton and Agnew photos by courtesy of "Bench and Bar."

vorce. Thereafter, the husband and wife entered into an agreement in which the husband, among other things, agreed that he ". . . would pay [the wife] $200 per month for her support 'during her life unless she remarries, and if she remarries the said monthly alimony payments to cease.'" At the trial, the agreement was introduced by the wife as an exhibit. The interlocutory decree of divorce ordered, among other things, the payment to the wife of $200 per month for her own support and maintenance during her life until she remarried. The decree contained a statement to the effect that "the above provisions are in accordance with the property settlement filed herein; the said property settlement is hereby approved by the court." The final decree of divorce adopted the terms of the interlocutory decree.

Approximately seven years after the interlocutory decree was entered, the husband applied to the court for a modification of the decree with respect to his payments. The application was based upon the changed financial condition of the husband. The court reduced the monthly payments from $200 to $100. Approximately eight years after the order of modification was made, the wife brought an action to recover the difference between the monthly payments of $200, provided for in the separation agreement and in the interlocutory decree, and the monthly payments of $100, provided for in the modification order. The trial court gave judgment for the wife. The Supreme Court reversed the judgment and held that the wife was not entitled to recover. Although the court in the *Hough* case referred to the separation agreement as a "property settlement," it is clear from the decision that the court did not interpret the agreement as being, in its entirety, an agreement to divide property.

MERGES INTO DECREE

The rule established by the *Hough*[13] case is that if a separation agreement containing a provision for alimony is presented to the court in a divorce proceeding, and if the alimony provision of the agreement is incorporated into the decree and made a part of the decree, that alimony provision of the separation agreement thereby merges into the decree. Thereafter, the wife would have no right of action to enforce the payments except a right based upon the decree, which is subject to modification.

[13]26 Cal. (2d) 605, 160 Pac. (2d) 15 (1945).

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VALUING CLOSELY HELD STOCK IN CALIFORNIA ESTATES

By Robert S. Thompson

Robert S. Thompson
—By courtesy of
"Bench & Bar"

MUCH tax law evolves from economic concepts. An inflexible doctrine enunciated as a reason for an admittedly correct result in a given case may, therefore, become a source of future difficulty as the economic background changes.

A concept propounded by the California Supreme Court in 1917 forcibly illustrates such an unfortunate result and all too frequently plagues the taxpayer in his relations with the State Inheritance Tax Department. That concept is that corporate stock is to be valued for inheritance tax purposes by assigning to it its pro rata share of value of corporate assets in those situations where there have been no sales of the stock.

Few can quarrel with the result reached by the Court in *In re Estate of Felton*, 176 Cal. 663, 169 Pac. 392 (1917), wherein the doctrine was first propounded. The Felton Company was a family corporation. No sales of stock in the company had been made at the time a large stockholder died. The inheritance tax appraiser valued the stock involved by first determining the net value of the assets of the corporation and then assigning to the stock its pro rata share. The appraisal was upheld by the trial court after hearing the conflicting testimony of expert witnesses.

The judgment of the trial court was affirmed by the Supreme Court in the *Felton* case, a decision apparently sound upon the record appearing in the reported case. Unfortunately, however, the Court expressly approved the State's theory that where shares of stock have never been upon the market and have never been sold privately, the only way to value such shares is "to ascertain the value of the property which they represent, assigning to each share its proportional worth."

HINDSIGHT INDICATES ERROR

Hindsight indicates the erroneous nature of that statement. Legally the doctrine ignores the separate entity of the corporation. Economically and factually the principle seizes upon one of many factors of valuation as determinative and ignores such matters of great probative weight as dividend and earnings record, current ratio, and most significantly the price at which shares of similarly situated corporations may be traded. It ignores also the distinction between the value of an undivided interest in a business and the worth of the whole thereof.

In 1917 the value of underlying assets may have been a fair approximation of the value of stock. If fluctuations of value of tangible and intangible property correspond, no great injustice results from the Felton rule. Perhaps for that reason the Courts of California have had little occasion to reconsider the decision.

In *In re Goodhue's Estate*, 127 Cal. App. 283, 15 Pac. (2d) 771, 1932, the District Court of Appeal held the Felton doctrine inapplicable where there had been a considerable number of private sales of closely held stock and stated that the trial court was not in error in considering not only the value of the property of the corporation but also the sales.

The Felton and Goodhue cases, considered together, leave open the right of the valuing authority to consider other factors of probative weight than underlying asset value and private sales.

The Inheritance Tax Department has made its administrative approach to the problem in Regulations Section 783.

Section 783 provides in part, "The value of shares of closely held stock is usually arrived at by first ascertaining the net worth (the excess of the assets, including good will, if any, over liabilities) of the corporation as a going business, and then assigning to each share its proportion of such worth."

In determining net worth, the tangible assets of the business in question should be valued at their fair market value to a going concern, and not at their cost to the particular business nor at their book value.

Among other factors that will be considered in the valuation of closely held stock are the following:

(a) The period of time that the issuing corporation has been in existence and its position in the trade.

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ATTORNEYS' INCOME TAX DEDUCTIONS

By Ralph R. Benson

Ralph R. Benson
—By courtesy of
"Bench & Bar"

CASE after case on the allowability of entertainment expenses as an income tax deduction hammers away at the basic point that expenses for entertainment must be for the entertainment of the client and not of the lawyer.

Stated more formally, expenses for entertainment to be allowable can only be ordinary and necessary to the carrying on of a legal practice if the sole object of such expenditures is to obtain or retain clients. Purely living expenses are, of course, non-deductible.

Exemplifying the degree of proof required to show the link between the expense and obtaining business, is the interesting case of a lawyer who succeeded in deducting golf club dues in full. In the words of the District Court judge:[1]

> "The plaintiff stated he did not enjoy playing golf; that green fees and food, paid for his prospective clients were the largest item on his monthly club bill. Plaintiff testified that he did not enjoy golf because he felt he should be working at the office. At the time of the formation of the partnership it was agreed that the club dues and expenses were to be charged as business expenses and were so charged on the books. The facts disclose that the main purpose of the plaintiff in joining the clubs was to obtain business and the plaintiff gave many names of clients secured by his partner and himself in this manner . . . and the Government cannot refuse to allow plaintiff a deduction as a business expense of the money which produced the business. To rule otherwise would revive the fable of the goose and the gold eggs."

If entertainment expenditures can be compared to this mythical goose, then it is possible upon the evidence of the particular case to have a 75% goose, or a 25% goose as well. In another case

[1] *Johnson* (DC, Calif.), 45 F. Supp. 377, 42-1 USTC ¶9180; *reversed on other grounds* (CCA-9), 135 Fed. (2d) 125, 43-1 USTC ¶9404 (1943).

involving golf club dues, a judge of the Tax Court allowed two-thirds of such dues as a business expense, and said:[2]

> ". . . we are not convinced that petitioner's use of the clubs was solely motivated by cold-blooded business considerations. Although the evidence of purely personal or social use is scant, we are unable to conclude that his use of the three clubs named was without its social aspect. In this situation some allocation to business use and social use must be made."

Indeed, the disposition of each claimed business expenditure "turns on the facts of each case."[3] Not to be overlooked is a situation in which the purpose of joining a club is for the retention of a clientele and not particularly for the purpose of enlarging it.[4] Such expenses are deductible for there is the necessary business element present.

VAGUE STATEMENT NOT PROOF

However clear the facts may be to the taxpayer-attorney, it is his job to bring out those particular facts identifying the nature of his claimed expenditure. His is the burden of proof. He does not meet it if he merely presents the argument ". . . that in general, membership in social, political, and fraternal organizations is helpful in obtaining clients through contacts made thereby" and couples with it merely "the citing of one instance of gaining a client through acquaintance made at a political club."[5] Proof requires specific facts; some sort of a showing.

Neither the Tax Court, the District Court nor the Commissioner of Internal Revenue desires to usurp the function of the American Bar Association in declaring a canon of ethics. When entertainment expenses tread into the realm of unethical conduct as prescribed under the existing canons, then such expenditures should be disallowed on the simple ground of public policy. Such situations, it is hoped, are rare.

A technical but important point in reporting entertainment expenses is to prevent overlapping of items. It is well to set out separately the various items, such as club dues, theatre tickets, telephone charges, automobile expenses,[6] yacht upkeep,[7] dinners

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[2] *Lee*, 5 TCM 240, 241 (1946).
[3] *Boehm*, 35 BTA 1106, 1109 (1937).
[4] *Armstrong*, 6 TCM 997 (1947).
[5] *Boehm*, 35 BTA 1106, 1109 (1937).
[6] *Donaldson*, 18 BTA 230 (1929).
[7] *Dickinson*, 8 BTA 722 (Acq.) (1927).

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COURTS-MARTIAL REVIEW BY CIVILIAN COURTS (During and After World War II)

By Henry Low

Henry Low
—By courtesy of "Bench & Bar"

SPATIAL limitations require succinctness and preclude any discussion of earlier cases and of the history and nature of courts-martial, other than to note that they are federal courts of special, limited jurisdiction, not part of the judicial system of the United States under Article III of the Constitution.[1]

For many years civilian court review of courts-martial was confined to determining whether the court-martial had jurisdiction over the person and offense. World War II and subsequent cases extended the area of scrutiny to certain constitutional deprivations.[2] Some cases refer to the modern doctrine that jurisdiction, validly acquired, may be lost by denial of certain constitutional rights; others discuss the constitutional problems without reference to the question of jurisdiction.[3]

It should be noted that when title II of Public Law 759, 80th Congress,[4] approved June 24, 1948, which makes profound modifications in the Articles of War, takes effect early in 1949, many aspects of army courts-martial, including review,[5] will be materially changed.

The majority of civilian court cases involving courts-martial since the commencement of World War II have been habeas corpus actions. Suits at law have also been brought to recover pay withheld pursuant to court-martial action,[6] and for damages against the government for wrongful conviction by court-martial, under the provisions of 18 USCA 729.[7]

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[1] *Ex parte Potens* (1946), 63 F. Supp. 582.
[2] *Shapiro v. U. S.* (1947), 69 F. Supp. 205.
[3] See note in (1948) 57 Harvard L. R. 483.
[4] Chapter 625, 2nd Session. The most publicized feature of the bill is Section 203 (Article of War 4), which permits enlisted personnel to sit on courts-martial trying enlisted personnel. See Wallenstein: *The Revision of the Army Court-Martial System* (1948), 48 Columbia L. R. 219.
[5] See Sections 226 and 230, particularly Article of War 50h.
[6] *Shapiro v. U. S.* (1947), 69 F. Supp. 205; *Shilman v. U. S.* (1947), 73 F. Supp. 648.
[7] *McLean v. U. S.* (1947), 73 F. Supp. 775.

There have been three principal types of attack upon courts-martial during the period in question: (a) cases in which persons convicted alleged they were not subject to court-martial; (b) cases in which it was alleged that the court-martial acted in excess of its jurisdiction, or in deprivation of constitutional rights, in other respects; (c) cases in which the legality of the sentence imposed was attacked.

PERSONS SUBJECT TO COURT-MARTIAL

The first group of cases concerns the question of when, under the Selective Training and Service Act of 1940, a registrant became subject to military law.

Mere registration did not subject the registrant to military jurisdiction.[8] It was first held that refusal to take the oath of induction did not prevent an inductee from becoming subject to military law,[9] as was also true in World War I, but in 1944 the United States Supreme Court held to the contrary,[10] relying in part on prevailing Army Regulations. Subsequent changes in Army Regulations led to results in the lower federal courts more favorable to those asserting military jurisdiction over the persons in question.[11]

Where an inductee undertook the duties and accepted the benefits of his status as soldier, failure to take the oath might be waived.[12]

The next group of cases concerns when military jurisdiction over members of the armed forces ceases.

An officer on terminal leave,[13] and a member of the Fleet Reserve on inactive status[14] are both subject to court-martial. And an honorably discharged sailor who reenlists the next day is not subject to court-martial for offenses committed during the prior enlistment.[15]

A sailor who becomes a prisoner of war retains his naval status,

[8] *Stone v. Christensen* (1940), 36 F. Supp. 739; *U. S. v. Herling* (1941), 120 Fed. (2d) 236.

[9] *U. S. ex rel. Diamond v. Smith* (1942), 47 F. Supp. 607; *Curia v. Pillsbury* (1944), 54 F. Supp. 196.

[10] *Billings v. Truesdell* (1944), 321 U. S. 542.

[11] *Mayflower v. Heflebower* (1944), 145 Fed. (2d) 864; *Hibbs v. Catavolo* (1944), 145 Fed. (2d) 866; *Ex parte Kruk* (1945), 62 F. Supp. 901.

[12] *U. S. v. Mellis* (1945), 59 F. Supp. 682; *Sanford v. Callan* (1945), 148 Fed. (2d) 376. *Cf., In re Herman* (1944), 56 F. Supp. 733.

[13] *Hironimus v. Durant* (1948), 168 Fed. (2d) 288.

[14] *U. S. ex rel. Pasela v. Fenno* (1948), 167 Fed. (2d) 593, certiorari granted (1948) 92 L. Ed. Adv. 1479.

[15] *U. S. ex rel. Hirshberg v. Malanaphy* (1948), 168 Fed. (2d) 503. See note in (1948) 36 Georgetown L. R. 445. *Cf., Ex Parte Drainer* (1946), 65 F. Supp. 410, affirmed *sub nom Gould v. Drainer* (1947), 158 Fed. (2d) 981.

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REVISION OF THE LAW —A PROPOSAL

By Louis M. Welsh

"The life of the law has not been logic: it has been experience."[1]

The courts alone (with occasional help from overburdened legislatures) have discharged the function of adapting private law to new conditions. This is so, in spite of the fact that, in theory,

Louis M. Welsh
—By courtesy of
"Bench & Bar"

"A LAW could never be made with foresight so far-reaching that it would solve all the life situations that are capable of being framed within its borders. The process of change and readjustment is eternal. Constant extension and retraction of the codes and common law must be carried on by some authorized body, for in law there are no absolutes. We can only develop rules that are true for a particular spatial and temporal environment."—*Louis M. Welsh.*

courts must merely apply the existing law to the facts of a given case. To change the law is theoretically an exclusive legislative function. The common law court is constitutionally ill-adapted to perform such duties. It is handicapped by a crowded calendar which permits little time for consideration of any one problem, by the narrow perspective one case presents to it, and at times even by the ability of judge and counsel.[2]

As a result of these handicaps the court, when exercising a free hand in interpreting law, has oft times raised more problems

[1]O. W. Holmes, Jr., *The Common Law*, p. 1.
[2]Mitchell Franklin, "The Historic Function of the American Law Institute," 47 Harv. L. Rev. 1367.

than it has solved. At other times it may, perhaps from fear of upsetting vested rights, fail to deviate from well-worn paths.

The body of the law must be consistent and certain, but it must also be sufficiently flexible so that it may be adapted to meet the requirements of a changing society. The tendency to disregard the past must be reconciled with the tendency to worship it. "The victory is not for the partisans of an inflexible logic nor yet for the levelers of all rule and precedent, but the victory is for those who shall know how to fuse those tendencies together in adaptation to an end as yet imperfectly discerned."[3]

N. Y. COMMISSION LINKS COURTS AND LEGISLATURE

Justice Cardozo believed that the solution lay in establishing a commission which could link the courts and legislature and communicate the requirements of the one to the other. Pursuant to his urgings, the New York legislature in 1934 enacted a statute which instituted a Law Revision Commission. That Commission is charged with the duties:

> "(1) To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the laws and recommending needed reforms.
>
> "(2) To receive and consider proposed changes in the law recommended by the American Law Institute, the commissioners for the promotion of uniformity of legislation in the United States, any bar association or other learned bodies.
>
> "(3) To receive and consider suggestions from judges, justices, public officials, lawyers and the public generally as to defects and anachronisms in the law.
>
> "(4) To recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions."[4]

The New York Commission is composed of practitioners, judges, and professors of law. It maintains permanent headquarters at Cornell University, Ithaca, New York, where a staff of

[3]B. N. Cardozo, *The Growth of The Law*, p. 143.
[4]N. L. Laws, Chap. 597, §1.

research assistants study substantive and procedural problems that need correction.

ADVANTAGES OF N. Y. COMMISSION

The past fourteen years, during which time the New York Commission has operated, give us evidence of the advantages of such a commission. Some of those advantages include: (1) current readjustment of the law to the society that it governs; (2) a practical outlet for the valuable contributions of legal scholars, which at present do little more than gather dust in school and county libraries; (3) a solution of foreseeable problems without the necessity of costly and uncertain litigation; (4) the clarification of statutes that courts find difficult to apply; and (5) greater certainty in the law through the formulation of rules developed from study of the novel conditions which science and society are from time to time imposing upon our civilization.[5]

It has been proposed that each state establish a commission similar to the one that now exists in New York.[6] New Jersey has recently passed an act to vitalize the law revision commission that it originally established in 1925. Louisiana and North Carolina have passed laws instituting such commissions in their jurisdictions. The Chicago Bar Association is currently considering the advisability of establishing a law revision commission in Illinois.

CALIFORNIA CODE COMMISSIONERS BUSY

We, in California, have a statute that so broadly defines the powers of the Code Commissioners that it is possible for them to assume some of the duties discharged by the New York Law Revision Commission without the necessity of further legislation. Section 10331 of the Government Code specifically authorizes the Code Commission to suggest substantive changes in the law to the legislature. To date, however, the Commission has expended all of its energies in compiling and revising the codes and has had no time to perform the larger task of examining the law with a view to revision.

Of course, from time to time the California State Bar Associa-

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[5]The precise work of the Commission has been adequately described in several law review articles: Bernard L. Shientag, "A Ministry of Justice in Action," 22 Cornell L. Q. 183; MacDonald & Rosenzwieg, "The Law Revision Commission of the State of New York," 20 Cornell L. Q. 415; Stone & Pettee, "Revision of Private Law," 54 Harv. L. R. 221. In the appendix to their article, "Revision of Private Law," Messrs. Stone and Pettee list the recommendations of the New York Law Revision Commission which have been enacted into law during the years 1935-1940, inclusive.

[6]Stone & Pettee, "Revision of Private Law," *supra* N. 5.

tion does propose to the legislature needed change in procedural law,[7] but no one at present is charged with the duty of examining the vast body of substantive law which, like Topsy, "just grows." Practitioners are too busy practicing, judges administering, professors teaching and writing to effectuate any planned change in the law.

A proposal to form a Law Revision Commission in California does in no way advocate the abolition of existing laws. On the contrary, it includes careful consideration of the preservation of those elements of the established law that can still function today. The value of a law cannot be measured by its duration. All law during the period in which it reflects the needs of the community is good.

The profession of law can be developed and maintained at a superior level only by clear thinking, discriminating analysis and an understanding of the practical operation of the system. It is for men of principle to endeavor to make some advancement every day. Why not seriously consider and earnestly work toward a Law Revision Commission in California?

STATUS AND EFFECT OF SEPARATION AGREEMENTS UNDER CALIFORNIA LAW

(Continued from page 6)

The *Hough* decision still left two important questions unanswered. These questions were:

(1) What would be the effect if the divorce decree simply approved the provisions of the separation agreement but expressly did not order the husband to comply with those provisions?

(2) How far was it necessary to go in order to incorporate the provisions of the separation agreement into the divorce decree? For example, would it be sufficient if the divorce decree, instead of repeating the pertinent provisions of the agreement in the decree, simply incorporated those provisions into the decree by reference and ordered compliance with them?

NO MERGER INTO DECREE

Both of these questions now have been answered. The first question was answered in 1947. In that year, the decision in

[7] "How An Individual Attorney Can Initiate a Change in the Law," 23 L. A. Bar Bul. 361.

Howarth v. Howarth[14] was rendered. The facts of the *Howarth* case, briefly stated, are as follows: Two years after the husband and wife had entered into a separation agreement, the husband was granted a divorce. The divorce decree did not incorporate the agreement, but it "confirmed and approved" the agreement. The husband was not ordered, under the express terms of the decree, to make support payments. Thereafter, the wife brought an action to recover money due under the provisions of the separation agreement. The husband, relying on the *Hough*[15] decision, contended that the complaint did not state a cause of action because the agreement had merged into the decree. The husband argued, therefore, that if the wife had any cause of action, it was a cause of action based upon the decree and not upon the agreement. The court held that the agreement was not merged into the decree because the decree merely had confirmed the agreement and had not ordered the husband to comply with the provisions of the agreement.

The second question raised by *Hough v. Hough*[16] was answered only a few months ago by the decision in *Price v. Price*.[17] In that case, the court held that there can be no merger of the alimony provisions of a separation agreement into a later divorce decree if the decree simply incorporates those alimony provisions by reference. There must be an actual incorporation either by attaching the pertinent provisions of the agreement to the divorce decree or by copying the pertinent provisions of the agreement into the decree.

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[14] 81 Adv. Cal. App. 324, 183 Pac. (2d) 670 (1947).
[15] 26 Cal. (2d) 605, 160 Pac. (2d) 15 (1945).
[16] 26 Cal. (2d) 605, 160 Pac. (2d) 15 (1945).
[17] 85 Adv. Cal. App. 928 (1948).

SUMMARY OF CALIFORNIA LAW

From the preceding discussion, the pertinent law of California with respect to the enforcement of separation agreements may be summarized as follows:

(1) An agreement between a husband and wife which merely purports to settle the property rights between the spouses is valid and binding upon the court unless it was obtained by fraud, compulsion, or violation of the confidential relationship.[18]

(a) Such an agreement is not subject to modification except with the consent of both spouses.[19]

(b) If such an agreement contains a provision for payments to the wife, and if such payments to the wife are made for the purpose of accomplishing a more equitable division of property, the provision for payments to the wife is binding upon the court and there can be no modification of it without the consent of the parties.[20]

(2) Provisions in a separation agreement which purport to deal with the custody and support of children are not binding upon the court.[21]

(3) A separation agreement may contain provisions for payments for the support of the wife in the nature of alimony.[22]

(a) If the alimony provisions are presented to a court in an action for divorce, the court has the power to modify them before judgment.[23]

(b) If the alimony provisions are presented to a court in an action for divorce, and if those provisions are incorporated into the divorce decree which orders compliance with them, the decree (and any modifications thereof) alone establishes the rights and obligations of the parties with respect to alimony.[24] This incorporation cannot be made by reference. It must be accomplished either by copying the pertinent provisions of the agreement into the decree or by attaching those pertinent provisions to the decree.[25]

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[18]Cal. Civil Code, §158; Cal. Civil Code, §159; *Puckett v. Puckett*, 21 Cal. (2d) 833, 136 Pac. (2d) 1 (1943); *Adams v. Adams*, 29 Cal. (2d) 621, 177 Pac. (2d) 265 (1947); *Holloway v. Holloway*, 79 Cal. App. (2d) 44, 179 Pac. (2d) 22 (1947).

[19]*Puckett v. Puckett*, 21 Cal. (2d) 833, 136 Pac. (2d) 1 (1943); *Holloway v. Holloway*, 79 Cal. App. (2d) 44, 179 Pac. (2d) 22 (1947).

[20]*Puckett v. Puckett*, 21 Cal. (2d) 833, 136 Pac. (2d) 1 (1943); *Adams v. Adams*, 29 Cal. (2d) 621, 177 Pac. (2d) 265 (1947).

[21]*Puckett v. Puckett*, 21 Cal. (2d) 833, 136 Pac. (2d) 1 (1943).

[22]Cal. Civil Code, §159; *Hough v. Hough*, 26 Cal. (2d) 605, 160 Pac. (2d) 15 (1945).

[23]Cal. Civil Code, §159; *Hough v. Hough*, 26 Cal. (2d) 605, 160 Pac. (2d) 15 (1945).

[24]*Hough v. Hough*, 26 Cal. (2d) 605, 160 Pac. (2d) 15 (1945).

[25]*Price v. Price*, 85 Adv. Cal. App. 928 (1948).

(c) If the alimony provisions are presented to the court in an action for divorce, and if the divorce decree confirms and approves the provisions without expressly ordering compliance with them, the alimony provisions do not merge with the decree. In this event, an action to enforce payments must be brought upon the agreement.[26]

VALUING CLOSELY HELD STOCK IN CAIFORNIA ESTATES

(Continued from page 8)

(b) The nature of the corporation.

(c) The operating history of the corporation and, particularly, its earnings over a reasonable period of time.

(d) The balance sheet of the corporation.

(e) The standard of earnings maintained by concerns engaged in similar lines of endeavor.

(f) The strength and danger of competition, both existing and potential.

[26] *Howarth v. Howarth*, 81 Adv. Cal. App. 324, 183 Pac. (2d) 670 (1947).

(g) The management and personnel.

(h) The effect of possible governmental regulation.

(i) The present and future requirements of the corporation in the matter of new land, buildings and equipment.

(j) Current business policy.

(k) Dividend payment history.

(l) The prices paid on private sales of the shares to persons who were in a position to know their value.

(m) The prospects for future earnings.

The approach of the Regulations thus requires consideration of many relevant factors and is undoubtedly sound. It would appear, however, that the "other factors" noted in the Regulations may be considered only in instances expressly not included within the scope of the Felton doctrine, *i.e.*, where there have been sales of the stock in question. While a different approach is consistent with the wording of Section 783, it is contrary to the decision of the highest Court of this State. There is, therefore, a substantial theoretical basis for the commonly assumed position of the Department that underlying assets only are to be considered where sales are lacking.

DISCRIMINATES AGAINST CLOSELY HELD STOCK

For the purpose of California Inheritance Tax and the probate appraisal, stock of closely held corporations is, consequently, valued primarily upon the basis of the worth of underlying assets where sales of the stock have not taken place. While in economic circumstances that may be denominated normal, such an approach may do justice in many cases today, the doctrine discriminates against the estate owning shares of closely held stock as compared with the estate owning listed securities.

The value of listed stocks has not increased proportionately with the value of tangible property. In the case of listed companies, it is possible to cite a long list of corporations whose asset value is greater than the total value of all shares of stock outstanding. Such a situation is typical of those companies with large fixed assets and which are earning a relatively small percentage return on those assets. Under the Felton rule, the peculiar economic circumstances existing at the present time apparently must be ignored.

AFFECTS FEDERAL TAXATION

The existence of the rule of valuation in California unfortu-

nately has an effect over and above its immediate result in imposing a disproportionate inheritance tax upon certain estates. The probate appraisal and inheritance tax appraisal are, in California, the same. In the typical situation, the appraisal is filed prior to audit of the Federal Estate Tax Return. While in theory the State appraisal has no bearing upon the determination of Federal tax, factually such an appraisal is of great psychological importance. The Felton rule, therefore, has an indirect bearing upon Federal Estate Tax and in actual practice may result in some California estate bearing an unfair share of the Federal death tax load.

To reiterate the obvious, it is this Article's conclusion that the Felton doctrine to the limited extent it may be modified by Department Regulations is an unsatisfactory method of valuation of closely held stock. The conclusion may be buttressed by comparison with the approach of other jurisdictions to the problem.

Internal Revenue Code Section 811(k) provides, "In the case of stock and securities of a corporation, the value of which by reason of their not being listed on an exchange and by reason of the absence of sales thereof, cannot be determined with ref-

erence to bid and asked prices or with reference to sales prices, the value thereof shall be determined by taking into consideration, in addition to all other factors, the value of stock or securities of corporations engaged in the same or a similar line of business which are listed on an exchange." Regulations 105, Section 81.10(c), interpreting I.R.C. 811(k), provide in part, "If actual sales or *bona fide* bid and asked prices are not available then . . . in the case of shares of stock, upon the basis of the company's net worth, earning power, dividend-paying capacity, and all other relevant factors having a bearing upon the value of the stock. Among such other relevant factors to be considered are the values of securities of corporations engaged in the same or a similar line of business which are listed on an exchange. However, the weight to be accorded such comparisons or any other evidentiary factors considered in the determination of a value depends upon the facts of each case."

The difference between the Federal and California approaches thus lies in the requirement of the Federal law that all factors of probative force in determination of value be considered whereas the Felton requirement is that some such factors be ignored.

NEW YORK LAW CHANGED SINCE FELTON CASE

The Felton case placed great reliance upon certain New York decisions (*In re Estate of Jones*, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476; *In re Crawford*, 85 Miscl. Rep. 283, 147 N. Y. S. 234; *In re Valentine*, 147 N. Y. S. 231). It is, therefore, of interest to observe the approach of a recent New York case considering the same problem. In *Estate of S. M. Flickringer*, 176 Miscl. 604, 28 N. Y. S. (2d) 118, 1941, the Court valued stock of a closely held company of which there had been no sales upon the basis of testimony of an expert witness who based his opinion regarding valuation of the stock upon comparison of the corporation involved with four other companies in like businesses.

The expert's analysis was based upon the factors of earning power, physical assets, book value and trend of business and concluded that upon the basis of the companies compared the stock in question should be valued at something below book value. The Court stated, "Courts, in determining fair market value, must base their decision on the evidence produced in each individual case. What might be the fair and equitable way of arriving at this value in one case might not be in another."

Whatever may be the justice and logic of the Felton rule, it remains the California law. A knowledge of the scope of the rule is, therefore, of importance. It appears that underlying asset value is the sole determinative factor where there have been no sales of the stock in question.

It would appear from the Regulations, however, that at least in the situation where there have been some sales of stock other factors may be considered in determining value. The problem in California is, therefore, limited to the situation where there have been no sales of stock.

ADVICE: MAKE A SALE

Should a case arise in which an estate containing a substantial block of such closely held stock must be valued for inheritance tax purposes, it will be well for the attorney to consider the practicality of the estate's selling a portion of its stock in a *bona fide* transaction. Such a sale will indicate the effect given by a willing buyer and willing seller to the factor of underlying asset value and will, in addition, take the case out of the scope of the Felton rule.

There will undoubtedly be situations where such sales are not possible as a practical matter. In these cases it is to be hoped that the California Courts follow the lead of the New York tribunals and depart from the doctrine of underlying asset value.

ATTORNEYS' INCOME TAX DEDUCTIONS

(Continued from page 10)

out and at home,[8] depreciation on radio and cocktail table,[9] attending bar conventions.[10]

PARTNER MAKE PERSONAL DEDUCTION?

Another technical point which seems to present some difficulty is whether entertainment deductions can be claimed only by the partnership on Form 1065, or whether a partner can claim entertainment expenses for which he is unreimbursed by the partnership on his own Form 1040.

On its face, there is a simple problem of the parties deciding on their arithmetic as to whether the particular entertainment deduction is to be taken on one return or to be split two or more ways. Behind such fundamental mathematics is the dilemma of whether one taxpayer (the individual) can take a deduction for an expenditure made on behalf of another taxpayer (the partnership).[11]

Happily, such a dilemma which plagues corporation-and-corporate-executive-situations seems to have been averted by an Office Decision which says that if the taxpayer was required by the partnership agreement to furnish his own expenses without reimburse-

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[8] *Vinson* (DC, Okla.), 45-2 USTC ¶9374 (1945).
[9] *Beaudry* (CCA-2), 150 Fed. (2d) 20, 5 TCM 61 (1945).
[10] *Ellis* (CA of DC), 50 Fed. (2d) 343, 2 USTC ¶731 (1931).
[11] *Roach*, 20 BTA 919 (1930); *Hess*, 24 BTA 475 (1931); *Stewart*, 5 TCM 229 (1946); *Low* (CCA-2), 154 Fed. (2d) 261, 46-1 USTC ¶9208 (1946); *Cf., Schmidlapp* (CCA-2), 96 Fed. (2d) 680, 38-1 USTC ¶9285 (1938); *Abraham*, 9 TC 222 (1947).

ment he can deduct such expenses on his own return,[12] taking the deduction into consideration before computing his adjusted gross income. Thus, as to partnerships, the question as to the person entitled to the deduction seems answered easily enough. At any rate, a recent Tax Court case assumes the point without discussion, and the case was acquiesced in by the Commissioner.[13]

Beyond a doubt, a complete itemization of amounts spent, where spent, and for what client would be most desirable in ascertaining the amount of the entertainment expenditure. However, business records on such matters are commonly not kept and lawyers are no exception to the general rule. An estimate is acceptable. As said by Circuit Judge Learned Hand in the leading *George M. Cohan* case:[14]

> "Absolute certainty in such matters is usually impossible and is not necessary; the Board should make as close an approximation as it can, bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making.

[12] O.D. 1122, 121.
[13] *Jacobson*, 6 TC 1048 (Acq.) (1946).
[14] *Cohan* (CCA-2), 39 Fed. (2d) 540, 2 USTC ¶489 (1930).

> But to allow nothing at all appears to us inconsistent with saying something was spent. True, we do not know how many trips Cohan made, nor how large his entertainments were; yet there was obviously some basis for computation, if necessary by drawing upon the Board's personal estimates of the minimum of such expenses. The amount may be trivial and unsatisfactory, but it was wrong to refuse any, even though it were the traveling expenses of a single trip. It is not fatal that the result will inevitably be speculative; many important decisions must be such."

This *Cohan* rule has often been applied, with varying results for the taxpayer. Some estimates have been allowed to the extent of all,[15] some 50%,[16] some none.[17] Estimating an expense can sometimes be a double process. First, an estimate is made of the total expenditure. Second, an estimate is made of the portion of the total allocable to business rather than the personal account.[18]

The recent *Bolt* decision of the Tax Court raises the question of whether the *Cohan* case requires a personal estimate by the trial court judge only if the Commissioner refuses to allow any of an estimated expense.[19] In the *Bolt* case, the taxpayer made an estimate of a sum, and so did the Commissioner. While the Commissioner's estimate was substantially less than that of the taxpayer, his estimate was more than zero. The Tax Court refused to make an independent estimate, upheld the estimate of the Commissioner and said that the *Cohan* case did not apply since some allowance had been conceded by the Government. It is submitted that the *Bolt* case does not delimit the *Cohan* case. Instead, it appears that both cases, on their own facts, reflect the basic doctrine that the taxpayer in having a judicial review of his controversy with the Commissioner must show that the determination of the Commissioner, whether it be to allow nothing or $10,000 as an expenditure, was incorrect.

For lawyers who are themselves employees of other lawyers, an entertainment deduction is also available as to unreimbursed expenses. However, the employed lawyer takes such deduction as a miscellaneous deduction *after* computing his adjusted gross income. Therefore, his expenditures actually avail him nothing on

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[15] *Vinson* (DC, Okla.), 45-2 USTC ¶9374 (1945).
[16] *Yeomans*, 5 TC 870 (1945).
[17] *Van Sicklen, Jr.*, 33 BTA 544 (1935).
[18] *Idem.*
[19] *Bolt*, 6 TCM 1291 (1947).

his tax return if he elects to use the alternative tax table or the standard deduction. The employee claims such a deduction for unreimbursed entertainment expenses by applying the tests of ordinary and necessary expense; and he may also estimate. Although the law is not entirely settled, the argument that one taxpayer (employee) should not be allowed to take a deduction for another (his employer) seems without merit if his employment expressly or impliedly requires the outlay of such unreimbursed sums.[20]

The lawyer, just as any other professional man who takes a deduction for entertainment expenses, may suffer some qualms knowing that such deductions admit the "strictly business" nature of ordinarily social contacts. However, just as any other taxpayer, the lawyer should be loath to overlook an allowable tax deduction.

COURTS-MARTIAL REVIEW BY CIVILIAN COURTS

(Continued from page 12)

and may subsequently be court-martialed for offenses violative of the Articles for the Government of the Navy committed while a prisoner.[16]

Article of War 94 (concerned with frauds against the government) provides that its violators remain subject to court-martial after discharge. A conviction based on such jurisdiction was upheld, the constitutionality of the statute not being challenged,[17] but a later case held the provision unconstitutional.[18]

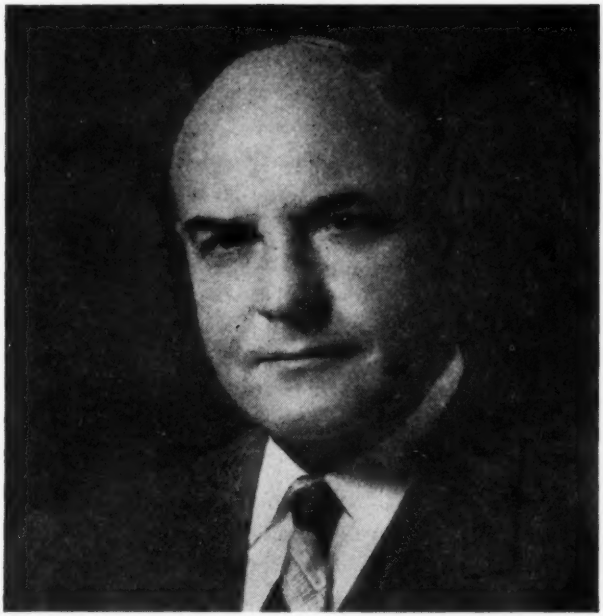
A court-martial cannot try a veteran for fraudulently obtaining a discharge.[19]

Persons under sentence adjudged by court-martial, although discharged from the army, remain subject to trial by court-martial for offenses committed while serving sentence.[20]

The third group of cases concerns civilians court-martialed under Article of War 2d, which subjects to military law: ". . . in time of war all . . . persons accompanying or serving with the armies of the United States in the field . . ."

In all the following cases the jurisdiction of a court-martial

[20] *Schmidlapp* (CCA-2), 96 Fed. (2d) 680, 38-1 USTC ¶9285 (1938)
[16] *U. S. ex rel. Hirshberg v. Malanaphy, supra.*
[17] *U. S. ex rel. Marino v. Hildreth* (1945), 61 F. Supp. 667.
[18] *U. S. ex rel. Flannery v. Commanding General* (1946), 69 F. Supp. 661.
[19] *U. S. ex rel. Flannery v. Commanding General, supra.*
[20] *Mosher v. Hudspeth* (1942), 123 Fed. (2d) 401; *Mosher v. Hunter* (1944), 143 Fed. (2d) 745; Article of War 2c.



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over the persons in question was upheld: a seaman,[21] a cook,[22] and a wiper[23] on ships owned by the U. S. Government but operated by private shipping lines under agency agreements, and used in transporting troops and/or materiel; an engineer recently dismissed by the Office of the Chief Engineer of the U. S. Forces at Frankfurt-am-Main in 1946 who lived in an army-controlled compound;[24] an employee of an aircraft manufacturer stationed at an air base in Eritrea;[25] a superintendent in charge of air conditioning and refrigeration for employees of a contractor engaged in salvage operations in an Eritrean harbor in 1942.[26]

A government employee in the Canal Zone in 1943 was held not subject to military jurisdiction on the ground that "in the field," in Article of War 2d, implied offensive or defensive operations regarding an enemy.[27]

CONSTITUTIONAL AND JURISDICTIONAL QUESTIONS

The "basic guarantee of fairness" provided by the due process clause in the Fifth Amendment applies to courts-martial,[28] although the specific safeguards are not necessarily the same as in civilian courts. The defendant is entitled to be confronted with the witnesses against him, but this right may be waived.[29] The right to a jury trial guaranteed by the Sixth Amendment is inapplicable.[30]

Double jeopardy. The "double jeopardy" provision of the Fifth Amendment applies to courts-martial.[31] Where both parties rested but the court continued the case so *it* could hear particular witnesses not before it, and thereafter the charges were withdrawn, in the absence of military necessity requiring the action taken,[32] the defendant was "put in jeopardy."[33] Where a first conviction

[21] *In re Berue* (1944), 54 F. Supp. 252. See note in (1944) 44 Columbia L. R. 575.
[22] *McCune v. Kilpatrick* (1944), 53 F. Supp. 80.
[23] *Shilman v. U. S.* (1947), 73 F. Supp. 648.
[24] *Grewe v. France* (1948), 75 F. Supp. 433.
[25] *In re Di Bartolo* (1943), 50 F. Supp. 929.
[26] *Perlstein v. U. S.* (1945), 151 Fed. (2d) 167.
[27] *Walker v. Chief Quarantine Officer* (1943), 69 F. Supp. 980.
[28] *U. S. ex rel. Innes v. Hiatt* (1944), 141 Fed. (2d) 664; *Beets v. Hunter* (1948), 75 F. Supp. 825.
[29] *Burns ex rel. Burns v. Sanford* (1948), 77 F. Supp. 464.
[30] *U. S. ex rel. Okenfus v. Schulz* (1946), 67 F. Supp. 528.
[31] *Sanford v. Robbins* (1940), 115 Fed. (2d) 435; *Wade v. Hunter* (1947), 72 F. Supp. 755.
[32] See note in (1948) 48 Columbia L. R. 299.
[33] *Wade v. Hunter* (1947), 72 F. Supp. 755.

is void, defendant has not been in jeopardy.[34] Where the President granted a new trial to one sentenced to death because of errors in the proceedings there was no constitutional violation.[35]

Pre-trial investigation. The investigation required by Article of War 70,[36] which to some extent replaces the information or indictment of civilian trials, is jurisdictional.[37] Failure to thoroughly investigate all relevant evidence may deny due process.[38] The investigation must be impartial; an investigation by the accuser who signed the charges hence is invalid.[39] Formerly an accused had no right to the aid of counsel during this investigation;[40] recent Congressional legislation has changed this rule, effective in 1949.[41]

Right to counsel. An army officer serving as counsel need not be a member of a civilian bar to satisfy the Sixth Amendment;[42] but 1948 changes in the Articles of War require the trial judge advocate and defense counsel to be members of the Judge Advocate General's Department or of the bar of a federal or a highest state court if such be available, and if the trial judge advocate is a member of one or the other the defense counsel must be so also.[43]

Mere ineptness of counsel does not violate due process;[44] but gross incompetency of appointed, undesired counsel may be a factor in finding a due process violation.[45]

Defendant may waive the presence of the regularly appointed defense counsel,[46] assistant defense counsel,[47] or his civilian attorney.[48]

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[34] *Wrubleski v. McInerney* (1948), 166 Fed. (2d) 243.
[35] *Sanford v. Robbins* (1940), 115 Fed. (2d) 435.
[36] Renumbered Article of War 46 by Public Law 759.
[37] *Anthony v. Hunter* (1947), 71 F. Supp. 823; *Henry v. Hodges* (1948), 76 F. Supp. 968; *cf. Reilly v. Pescor* (1946), 156 Fed. (2d) 632; see note in (1948) 57 Yale L. J. 483.
[38] *Hicks v. Hiatt* (1946), 64 F. Supp. 238.
[39] *Henry v. Hodges* (1948), 76 F. Supp. 968.
[40] *Romero v. Squier* (1943), 133 Fed. (2d) 528.
[41] Public Law 759, 80th Congress, Sec. 222 (Article of War 46).
[42] *Romero v. Squier* (1943), 133 Fed. (2d) 528; *Benjamin v. Hunter* (1948), 75 F. Supp. 775.
[43] Public Law 759, 80th Congress, Sec. 208 (Article of War 11).
[44] *Ex parte Benton* (1945), 63 F. Supp. 808; *Ex parte Smith* (1947), 72 F. Supp. 935.
[45] *Beets v. Hunter* (1948), 75 F. Supp. 825.
[46] *U. S. ex rel. Innes v. Crystal* (1943), 131 Fed. (2d) 576.
[47] *Flackman v. Hunter* (1948), 75 F. Supp. 871.
[48] *Altmayer v. Sanford* (1945), 148 Fed. (2d) 161.

Where counsel is given inadequate time to prepare the defense, a denial of the assistance of counsel guaranteed by the Sixth Amendment occurs, as well as a denial of due process under the Fifth Amendment.[49]

SENTENCES

Under military law, sentences imposed by separate courts-martial run consecutively, not concurrently.[50]

Until mid-1947 military prisoners sentenced to federal penitentiaries received the "good time" deduction allowed civilian prisoners, not the greater deduction given prisoners in military barracks—the lesser deduction being regarded as merely a consequence of the sentence.[51] Recently the rule was changed; now military prisoners in civil prisons receive "good time" at the military rate.[52]

Although imposition of the death sentence requires a unanimous vote, unanimity is not required to *convict* of an offense for which the death sentence is permissive but not mandatory.[53] However, for such an offense, the death penalty may be imposed, by a unanimous vote, even though conviction was by less than unanimous vote.[54]

One of the interesting changes made by Public Law 759, 80th Congress, is a provision that, when a sentence to dismissal may be adjudged in the case of an officer, the sentence may, in time of war, adjudge in lieu thereof reduction to the grade of private.[55]

Related questions, beyond the scope of this paper, include court review of trials by *military commission*[56] and trials by provost courts of the "Military Government" in Hawaii.[57]

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[49] *Shapiro v. U. S.* (1947), 69 F. Supp. 205.

[50] *Mosher v. Hudspeth* (1942), 123 Fed. (2d) 401; *O'Malley v. Hiatt* (1947), 74 F. Supp. 44.

[51] *Fitch v. Hiatt* (1943), 48 F. Supp. 388; *Innes v. Hiatt* (1944), 57 F. Supp. 17; *Johnson v. Hiatt* (1947), 71 F. Supp. 865.

[52] *Green v. Schilder* (1947), 162 F. (2d) 803.

[53] *Stout v. Hancock* (1945), 146 Fed. (2d) 741. See Public Law 759, 80th Congress, Sec. 220 (Article of War 43).

[54] *Ex parte Besherse* (1946), 63 F. Supp. 997, app. dism. (1946), 155 Fed. (2d) 723. *Cf. Hurse v. Caffey* (1945), 59 F. Supp. 363; *Ex parte Campo* (1947), 71 F. Supp. 543.

[55] Sec. 221 (Article of War 44).

[56] See *Ex parte Quirin* (1942), 317 U. S. 1; *Hammond v. Squier* (1943), 51 F. Supp. 227; *Application of Yamashita* (1946), 327 U. S. 1; *Homma v. Patterson* (1946), 327 U. S. 759.

[57] *Duncan v. Kahanamoku* (1946), 327 U. S. 304.